No. 84-47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GREGORY ALLEN PERSINGER,
LAWRENCE PERSINGER AND JACQUELINE PERSINGER,
Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

BRICE M. CLAGETT *
CATHERINE W. BROWN
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

PETER J. NEESON
Philadelphia, Pennsylvania

JULIAN N. EULE
Los Angeles, California

MARK H. TUOHEY, III
JOHN P. COALE
Washington, D.C.

Counsel for Petitioners

September 20, 1984 * Counsel of Record

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1. The United States, opposing certiorari, now argues, contrary to its position below, that the FSIA permits suits against a foreign state "only for tortious *acts* occurring within the sovereign territorial jurisdiction of the United States." Opp. 6 (emphasis added); *id.* at 9 n.8. In the Court of Appeals, the government argued that, for purposes of suits under Section 1605(a)(5), "it is enough if the tortious *injury* occurs in the United States." See Pet. 6 & n.7 (emphasis added); *id.* at 12 & n.20. The government does not even acknowledge (much less attempt to explain) its about-face or seek to justify its new position in the face of Section 1605(a)(5)'s unambiguous

language. See Pet. 15.[1] Since, as the United States recognizes, the injuries suffered by petitioners Lawrence and Jacqueline Persinger "unquestionably occurred 'in the United States' " (Opp. 4), it was gross error for the Court of Appeals to hold that the District Court lacked jurisdiction to hear their claims against Iran. This error has far-reaching consequences for the application of Section 1605(a)(5) to suits by those who are injured in the United States as a result of a foreign state's tortious conduct abroad.[2]

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[1] The United States recognizes (Opp. 15 n.16) that Section 1605(a)(5), as enacted in 1976, omitted language contained in the provision as originally proposed in 1973 that would have required that both the injury *and* the tortious conduct occur in the United States. See Pet. 16-18. The government argues, however, that this modification of Section 1605(a)(5)'s original language should be accorded no significance. Opp. 15 n.16. But there can be no doubt that the elimination of that language represented a substantive change in the jurisdiction that Section 1605(a)(5) conferred, and—as we have shown—substantive changes made in the statute's original language "were . . . considered very carefully by the Administration" before being proposed to Congress. Sandler Aff. ¶ 4 (Pet. App. 62a). To disregard this change and rely instead on contrary language in the House report that was obviously retained by mistake is to confound the legislative process and the purposes of the FSIA.

[2] The United States does not even attempt to defend the Court of Appeals' holding that, because Iran's tortious conduct did not occur "in the United States," the District Court lacked jurisdiction over Lawrence and Jacqueline Persinger's claims. The government urges only that the court's holding does not merit review (Opp. 15), and it insists that the parents' claims were properly dismissed as "derivative" of the claims of their son. Opp. 14. But neither of the courts below held that Lawrence and Jacqueline Persinger's claims were barred as "derivative"—although the government strenuously argued that their claims should be dismissed for that reason. Had it found merit in the government's position, the Court of Appeals could have upheld the District Court's dismissal of the parents' claims on that more limited ground; but the court instead broadly held that Section 1605(a)(5) permits suits only where a foreign state's tortious conduct, as well as the resulting injury, occurred in the United States.

(*footnote continues*)

2. The United States, urging that U.S. embassy premises should not be deemed to be "territory . . . subject to the jurisdiction of the United States" for purposes of FSIA, also jettisons its previous construction of Section 1603(c) to preserve its victory below. Having persuaded the Court of Appeals that Section 1603(c)'s definition of the United States should be limited to "the continental United States and such islands as are part of the United States or are its possessions" (Pet. App. 8a), the government now claims that the definition should be limited to territory and waters "under American sovereignty." Opp. 7; see *id.* at 6. The government's change of position is apparently due to our demonstration that other statutory definitions of the "United States" render the Court of Appeals' construction of Section 1603(c) untenable. See Pet. 9-10 & n.14. The United States, again, neither acknowledges nor attempts to explain its switch as it proffers ever-shifting constructions of FSIA's terms to support the result reached below.

3. The government's argument that the U.S. embassy in Tehran should not be considered "territory . . . subject to the jurisdiction of the United States" for purposes of FSIA cannot withstand scrutiny. Its reliance on *Cunard S.S. Co.* v. *Mellon,* 262 U.S. 100 (1923), is misplaced. This Court in *Cunard* was not called upon to decide whether territory not subject exclusively to U.S. jurisdiction could be deemed "territory . . . subject to the jurisdiction of the United States." The Court instead was faced with the claim that a merchant ship sailing under an

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(*footnote continued*)

The government's reliance on the *Feres* doctrine to demonstrate that Lawrence and Jacqueline Persinger's claims are barred (Opp. 14) is misplaced. *Feres* bars claims by the families of military personnel arising from injuries to their relatives in the armed forces not because such claims are "derivative" but because litigating those claims would entail the very inquiry into military decision-making that the *Feres* doctrine is meant to preclude.

American flag on the high seas constituted United States "territory" for purposes of the National Prohibition Act. *Id.* at 122-23. Rejecting that claim, the Court held that the term "territory" was used in the Act "in a physical and not a metaphorical sense,—that it refers to areas or districts having fixity of locations and recognized boundaries." *Id.* at 122. Embassy premises plainly satisfy that criterion.

The government also attempts to depict Section 1603(c) as a "legal term of art" that does not mean what it says. Opp. 7. But the statutes to which the government points, defining the United States as "used in the territorial sense" (*id.* at n.4), simply distinguish between references to the United States as a state or a party and the United States as a place. The fact that some statutes which define the United States in terms similar to Section 1603(c) "involve subjects that could not possibly encompass American embassies" (*id.*) does not demonstrate that American embassies do not constitute "territory . . . subject to the jurisdiction of the United States"; such statutes would have no application to embassies because of their subject matter, not because embassies as such are excluded.

The United States claims that construing U.S. embassies to be "territory . . . subject to the jurisdiction of the United States" would permit suits without "the minimum contacts necessary to satisfy due process." Opp. 9 n.8. This claim must be rejected. *First,* the government's suggestion that minimum contacts would be present only if the foreign state's tortious *conduct* occurred in the forum state (*id.*) contradicts its earlier position that it is enough for FSIA's purposes if the *injury* occurred in the United States. *Second,* if a foreign state enters upon territory subject to the jurisdiction of the United States—including U.S. embassy premises—it is entirely reasonable to assume that the foreign state anticipates being held accountable in American courts for injuries it causes on such

territory. *Third,* both international law and United States law have long recognized that a nation may exercise jurisdiction over international crimes even when such crimes do not occur in the territory of the forum state. See Pet. 13. No foreign state entering embassy premises for such criminal purposes could reasonably fail to anticipate that it would be called to justice in U.S. courts.

The government's law-exam hypotheticals present no difficulty. In the examples involving torts by a foreign state on U.S. embassy premises (see Opp. 12), the foreign state would be free to invoke the doctrine of *forum non conveniens* if sued in American courts; under principles of "reciprocity or parity of reasoning" (*id.* at 13), the same doctrine would be available to the United States if it were sued abroad for tortious injuries occurring on the premises of a foreign state's embassies. See *id.* For the same reason, construing Section 1603(c) to include *all* "territory . . . subject to the jurisdiction of the United States" presents no problem with respect to the unidentified "countless enclaves" that the government says the United States maintains abroad (Opp. 12 n.13); and in any event this Court need not hold that such "enclaves" constitute "territory . . . subject to the jurisdiction of the United States" under Section 1603(c) to hold that U.S. embassies satisfy that definition.

If permitting suits here for particular types of tortious injury occurring on U.S. embassy premises were thought to threaten particular difficulty for the United States, Congress could readily qualify Section 1605(a) to preclude suits in American courts for such injuries. But the government has shown no justification for judicially qualifying the reach of Section 1605(a) by importing into Section 1603(c)'s definition of "United States" a wholesale bar to suits for tortious injuries occurring on U.S. embassy premises.

4. This case tests the willingness of the federal courts to entertain compelling claims that are plainly allowed by the express terms of FSIA. The United States managed to persuade the Court of Appeals, on rehearing, to disregard the plain terms of the statute, and, having managed to secure that victory below, the United States now urges this Court to deny review—even as the lurches in the government's own position with respect to the meaning of the statutory provisions at issue make the case for review more compelling. The questions raised by the judgment below are fully developed, starkly drawn, and of manifest national importance. They clearly warrant review.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the petition, review should be granted.

Respectfully submitted,

BRICE M. CLAGETT *
CATHERINE W. BROWN
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
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PETER J. NEESON
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